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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. BILLY SHANE GILPIN, Defendant and Appellant.	C087517 (Super. Ct. No. 18CR000448)

Defendant Billy Shane Gilpin was sentenced to five years in prison pursuant to a plea agreement in which he pled guilty to possession of a controlled substance, methamphetamine, and misdemeanor possession of controlled substance paraphernalia. He contends Penal Code[1] section 1001.36 applies retroactively, requiring conditional reversal of his convictions and sentence and remand of the matter for the trial court to

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1 All further section references are to the Penal Code unless otherwise specified.

conduct a mental health diversion eligibility hearing. Alternatively, defendant argues the concurrent sentence on the paraphernalia possession count should be stayed pursuant to section 654.

The People argue defendant's mental health diversion claim should be dismissed for failure to obtain a certificate of probable cause and, in any event, the claim fails on the merits because section 1001.36 does not apply retroactively. As to the second contention, the People concede the trial court should have stayed punishment on the paraphernalia possession count under section 654.

We disagree with the People that a certificate of probable cause was required to raise the section 1001.36 issue. We do not reach the question of retroactivity, however, because we conclude defendant has failed to show section 1001.36 may apply to him. Finally, we accept the People's concession and agree the concurrent sentence on the paraphernalia possession count violates section 654. We accordingly stay the sentence on that count. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2018, a parole officer conducted an unannounced visit at defendant's home. Defendant told the officer he would test positive for methamphetamine. The officer searched defendant's home and found a hypodermic syringe, a spoon with a piece of cotton stuck to it, and a baggie with one-tenth of a gram of methamphetamine in a bedroom closet.

Defendant was charged with possession of a controlled substance, methamphetamine, and misdemeanor possession of controlled substance paraphernalia. As to the controlled substance count, the information alleged defendant had a prior strike and had served a prior prison term.

On April 23, 2018, defendant entered an open plea of guilty on both counts and admitted the special allegations in return for a seven-year "lid" and the right to seek *Romero* relief. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.) The plea

agreement further provided defendant would be referred to the behavioral health court. The trial court denied defendant's *Romero* request and application for probation. The behavioral health court denied defendant's referral, noting he "has severe mental health and substance use issues" and suffers from a mental disorder identified in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders. On June 4, 2018, the court sentenced defendant to five years in prison.

Defendant filed a timely notice of appeal. He did not obtain a certificate of probable cause.

DISCUSSION

I

Mental Health Diversion

A

No Certificate Of Probable Cause Required

The People contend defendant's section 1001.36 argument should be dismissed for failure to obtain a certificate of probable cause. We disagree.

Section 1237.5 provides in relevant part that "[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

" 'The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy "by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and

money is spent preparing the record and the briefs for consideration by the reviewing court." [Citations.]

" 'It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]' [Citation.]

" 'In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.' " (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.)

Our Supreme Court has explained that a plea in which the parties agree to a maximum sentence does not require a certificate of probable cause unless the defendant challenges the legal validity of the maximum sentence itself. (*People v. Buttram*, *supra*, 30 Cal.4th at pp. 790-791.) "When the parties negotiate a *maximum* sentence, they obviously mean something different than if they had bargained for a *specific* or *recommended* sentence. By agreeing only to a maximum sentence, the parties leave unresolved between themselves the appropriate sentence within the maximum. That issue is left to the normal sentencing discretion of the trial court, to be exercised in a separate proceeding." (*Id.* at p. 785.)

"[A] certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an

agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be. Accordingly, such appellate claims do not constitute an attack on the validity of the plea, for which a certificate is necessary." (*People v. Buttram*, *supra*, 30 Cal.4th at pp. 790-791; see *id.* at p. 777 ["Unless it specifies otherwise, a plea agreement providing for a maximum sentence inherently reserves the parties' right to a sentencing proceeding in which (1) . . . they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges otherwise available against the court's exercise of that discretion are retained"].)

Here, the parties agreed to a maximum sentence of seven years in the plea agreement and the trial court exercised its discretion by imposing a lesser sentence of five years. Defendant's challenge to the trial court's sentencing discretion relating to the application of section 1001.36 does not require a certificate of probable cause.

B

Defendant Failed To Show Section 1001.36 May Apply To Him

Defendant contends we should conditionally reverse his convictions and sentence and remand the matter for the trial court to conduct a mental health diversion eligibility hearing under section 1001.36 because he suffers from "a qualifying diagnosed mental disorder." He contends the statute applies retroactively to him, relying on *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220.[2] We do not reach the question of retroactivity because we conclude defendant has failed to

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[2] The questions before the California Supreme Court on review of *Frahs* are whether section 1001.36 applies retroactively to all cases in which the judgment is not yet final and whether the Court of Appeal erred by remanding for a determination under section 1001.36.

show section 1001.36 *may* apply to him such that affirming the judgment would result in a miscarriage of justice.

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573), and we shall not set aside a judgment unless we find "the error complained of has resulted in a miscarriage of justice" (Cal. Const., art. VI, § 13). As this court explained in *Waller*, "[p]rejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) Here, the error complained of is that defendant was not given the opportunity to seek a mental health diversion eligibility hearing under section 1001.36.

Section 1001.36 was enacted after defendant's sentencing (Stats. 2018, ch. 34, § 24, eff. June 27, 2018) and provides pretrial diversion may be granted if the trial court finds all of the following criteria are met: (1) the defendant suffers from a recently diagnosed mental disorder enumerated in the statute; (2) the disorder was a significant factor in the commission of the charged offense, and that offense is not one of the offenses enumerated in subdivision (b); (3) "[i]n the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment"; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment as a condition of diversion; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if treated in the community. (§ 1001.36, subd. (b)(1)-(2).) If the treatment under pretrial diversion is deemed successful, the charges shall be dismissed and the defendant's criminal record expunged. (§ 1001.36, subds. (b)(1)(A)-(C), (c)(3), (e).)

The statute further provides: "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the

minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3).)

We disagree with *Frahs* and *Weaver* that a defendant meets his or her burden of demonstrating a miscarriage of justice occurred merely by arguing he or she has a diagnosed mental health disorder within the meaning of section 1001.36, subdivision (b)(1)(A), as defendant attempts to do here. (See *People v. Frahs*, *supra*, 27 Cal.App.5th 784; *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1121-1122, review granted Oct. 9, 2019, S257049.) Rather, we find it appropriate to require a defendant, raising the issue for the first time on appeal, to show that he or she *may* fall within the class of persons who may seek discretionary relief under the statute such that affirming the judgment would result in a miscarriage of justice. Practically speaking, this means a defendant must meet the requirements of section 1001.36, subdivision (b)(3) -- that is, showing he or she "will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion."

While we require a defendant to make an *argument on appeal* that he or she *may* be entitled to relief under the statute, we do not require a defendant to make a showing that the trial court *would* grant mental health diversion. This is an important distinction. Defendant, of course, did not have the benefit of developing the record and evidence at trial to support a claim for diversion under a statute that was not then in existence. Moreover, the eligibility determination is soundly vested in the trial court and we will not make any factual determinations in the first instance on appeal as to whether a defendant has sufficiently demonstrated any of the eligibility factors for mental health diversion or speculate as to whether the trial court will find defendant eligible for mental health diversion.

What we require, however, is that defendant meets his burden on appeal to demonstrate that affirmance of the judgment will result in a miscarriage of justice. Defendant argues only that he has a qualifying mental health disorder under section 1001.36, subdivision (b)(1)(A). This is insufficient. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) We will not make defendant's arguments for him.

II

The Sentence On The Drug Paraphernalia Possession Count Must Be Stayed Under Section 654

Defendant contends his concurrent sentence on the drug paraphernalia possession count was imposed in error because the sentence should have been stayed under section 654. The People concede the point. We accept the concession and agree.

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." As this court explained in *Louie*: "The challenge in applying section 654 arises because, '[f]ew if any crimes . . . are the result of a single physical act.' [Citation.] Accordingly, courts have long recognized that the proscription against multiple punishment may also apply when a course of criminal conduct violates more than one statute. [Citation.] Where a defendant's crimes are the result of a course of criminal conduct, courts endeavor to determine whether the course of conduct is divisible, i.e., whether it constitutes more than one criminal act. [Citation.] A course of conduct will give rise to more than one criminal act if the actions were incident to more than one objective. [Citation.] The point of determining whether a defendant had more than one criminal objective is to discover whether the defendant's multiple actions should be considered one criminal act or more

than one criminal act for the purpose of section 654." (*People v. Louie* (2012) 203 Cal.App.4th 388, 396-397.)

As the People explain, the methamphetamine and syringe were found in the same place -- defendant's bedroom closet. Those items were found along with a spoon, a tool commonly used to prepare methamphetamine for injection. There is no evidence in the record suggesting defendant had a different or separate intent with regard to the paraphernalia other than to use it to inject the methamphetamine. Thus, there is no substantial evidence to support the trial court's implied finding of a separate intent or objective. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) Section 654 applies to stay the punishment for the drug paraphernalia possession count.

DISPOSITION

The punishment for the drug paraphernalia possession count is stayed pursuant to section 654. In all other respects, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

/s/
Robie, Acting P. J.

We concur in the result:

/s/
Butz, J.

/s/
Murray, J.